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No. 78-743

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST RIZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 583 F.2d 907. This opinion was supplemented with an unpublished opinion (Pet. App. 7a-19a).

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1978, and a petition for rehearing was denied on October 6, 1978 (Pet. App. 20a). The

petition for a writ of certiorari was filed on November 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2511 provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; * * *
>
> shall be fined not more than $10,000 or imprisoned not more than five years, or both.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2511(1)(a) prohibits a private investigator, acting at the behest of one spouse, from intercepting wire communications between the other spouse and a third party in the marital home.

2. Whether the seizure of a tape cassette petitioner was holding in plain view violated the Fourth Amendment.

3. Whether the indictment sufficiently alleged a violation of 18 U.S.C. 2511(1)(a).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 13 counts of unlawfully endeavoring to intercept and intercepting wire communications, in violation of 18 U.S.C. 2511(1)(a). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-19a).

The evidence at trial established that petitioner, a licensed private investigator, was employed by several persons to investigate suspected marital infidelities. In carrying out these assignments petitioner used electronic equipment to intercept and record wire and oral communications between the suspected spouses and third parties (Pet. App. 2a). Ten of the 13 counts on which petitioner was convicted involved interceptions or attempted interceptions occurring with the knowledge, consent and (in some cases) assistance of the client-spouse within the home in which both spouses were then residing (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 4-8) that 18 U.S.C. 2511 is inapplicable to the interception of communications of one spouse in the marital home at the behest of the other spouse.[1]

As the court of appeals acknowledged (Pet. App. 3a), the lower courts have expressed divergent views on the question whether Section 2511(1)(a) applies to

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[1] Ten of the counts on which petitioner was convicted involved interceptions with the knowledge and consent of one spouse. Since petitioner was convicted on three other counts and he received identical concurrent sentences on each count, the Court need not consider this issue. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

interceptions by one spouse of the other spouse's communications within the marital home. Compare *Simpson* v. *Simpson*, 490 F. 2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974), with *United States* v. *Jones*, 542 F. 2d 661 (6th Cir. 1976). Nevertheless, the court below correctly concluded (Pet. App. 4a) that it need not decide whether the statute applies to that type of conduct, since the courts have uniformly agreed that Section 2511(1)(a) applies to the conduct involved here—interceptions by third parties, such as private investigators, even if the interception was instigated by one spouse. In *United States* v. *Jones*, *supra*, 542 F. 2d at 669, the Sixth Circuit concluded that Section 2511 "establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation" (footnote omitted). And in *Simpson* v. *Simpson*, *supra*, 490 F. 2d at 808-809, although the Fifth Circuit held that Section 2511 does not reach one spouse's interception of the other spouse's conversations within the marital home, it expressly recognized that the statute would have applied if the interception had been made by a private investigator acting at one spouse's behest: [2]

[2] *Simpson* was a civil action brought under 18 U.S.C. 2520. As applicable here, the civil and criminal liabilities are coextensive. "That is, if [the civil plaintiff] prevails * * * then [the defendant] is subject to severe criminal penalties, assuming of course that the prosecution could meet the higher standards of proof required for criminal convictions." *Simpson* v. *Simpson*, *supra*, 490 F.2d at 809. See also *United States* v. *Jones*, *supra*, 542 F.2d at 672 n. 23.

> * * * were appellant seeking to recover from a third party, we could not, on the basis of this legislative history, accept the defense that the interceptions were authorized by the husband. However, to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse.

In *White* v. *Weiss*, 535 F. 2d 1067 (1976), the Eighth Circuit followed *Simpson* and held that a private investigator's interception of conversations within the marital home with the consent of one spouse fell within the statute. Accord, *Remington* v. *Remington*, 393 F. Supp. 898 (E.D. Pa. 1975).[3]

In sum, there is no support for petitioner's argument that Section 2511(1)(a) does not apply to interceptions by a private investigator retained by one spouse to gather evidence in a marital dispute. The electronic interception of private conversations by a third party is precisely the type of conduct covered by the statute.[4]

[3] Petitioner relies (Pet. 6-7) on *Anonymous* v. *Anonymous*, 558 F.2d 677 (2d Cir. 1977), but that case concerned the interception by one spouse, over his own telephone, of conversations between the other spouse and their daughter. The court did not address the question whether an interception by a third party, such as a private investigator, would be within the reach of the statute.

[4] Petitioner also makes the related argument (Pet. 8-11) that he is entitled to a new trial because the district court erroneously instructed the jury that spouses as well as third parties are subject to the prohibitions of Section 2511. He argues that even assuming that this instruction was correct

2. Petitioner contends (Pet. 11-13) that the warrantless seizure of a tape cassette violated the Fourth Amendment.

The agents who seized the cassette had just completed a search of petitioner's car pursuant to a warrant that authorized the seizure of a tape recorder, tape cassettes, and a radio receiver as evidence of petitioner's unlawful interceptions of wire communications at a building on Bumblebee Drive (Tr. 315, 511-512). Shortly after the agents had completed the search of petitioner's car, which was parked on the street in front of the building on Bumblebee Drive, they saw petitioner emerge from the building carrying a tape cassette in his hand. The agents stopped petitioner, advised him of the warrant authorizing the search of his c[illegible], and seized the cassette (Tr. 316, 512-514, 765-771).

The court of appeals correctly concluded that the seizure of the cassette in these circumstances was lawful (Pet. App. 5a):

> [The agents] had information that [petitioner] was engaged in unlawful wiretapping activities in the building from which they saw him emerge. This provided a reasonable basis for believing that the cassette he was carrying was being or had been used in those activities. It was in plain view of the agents at a place where they had a right and a legitimate reason to be. *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-474 (1971). If they had deferred seizing it until they had obtained a warrant for its seizure, it would surely have been erased or secreted. There was thus an exigent circumstance.

See *United States* v. *Sedillo*, 496 F.2d 151 (9th Cir.), cert. denied, 419 U.S. 947 (1974).[5]

3. Section 2511(1)(a) reaches any person who "willfully intercepts * * * any wire or oral communication." Petitioner contends (Pet. 13-17) that his indictment was fatally defective because it charged that he acted "knowingly and unlawfully" rather than "willfully."

Petitioner's contention was correctly rejected by the court of appeals and does not merit further review by this Court. An indictment is sufficient even though it does not state the requisite mental element of a crime in the precise words of the statute if it uses "*words of similar import.*" *Finn* v. *United States*, 256 F. 2d 304, 306 (4th Cir. 1958). Where,

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as regards third parties, it was prejudicial here because the jury was instructed that it could find petitioner guilty if he aided and abetted in a violation of Section 2511. This instruction, he contends, permitted the jury to find him guilty of assisting in what he argues would be an innocent act—one spouse's interceptions of the other spouse's communications within the marital home. Petitioner did not squarely raise this objection in either the trial court (see Tr. 1971-1973, 1980-1981, 2090) or the court of appeals, and accordingly it should not be a ground for review in this Court. See also Fed.R.Crim.P. 30, 52(b); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7 (1977).

[5] We do not suggest that the seizure was made pursuant to the warrant, which authorized a search of petitioner's automobile, not his person. We note that petitioner does not contend that the agents lacked probable cause to believe that the cassette was evidence of a crime or that the discovery of the cassette was not inadvertent. See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 469-471.

as here, the defendant does not challenge its sufficiency prior to trial, the indictment should be upheld "unless it is so obviously defective as not to charge the offense by any reasonable construction." *United States* v. *Vanderberg*, 358 F. 2d 6, 10 (7th Cir. 1966). See *United States* v. *Pheaster*, 544 F. 2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v. *Willis*, 515 F. 2d 798, 799-800 (7th Cir. 1975); *United States* v. *Santelises*, 476 F. 2d 787, 788 (2d Cir. 1973). Applying this standard, the court of appeals properly affirmed petitioner's convictions, because the allegation that petitioner "knowingly and unlawfully" violated Section 2511 was of sufficiently similar import to the term "willfully" to charge the offense (Pet. App. 7a-8a).[6] The indictment was clearly sufficient to protect petitioner against any future prosecution for the same offense, and he does not contend that the indictment failed to provide adequate notice to allow him to prepare his defense or prejudiced him in any other way.

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[6] Petitioner's reliance on *United States* v. *Denmon*, 483 F.2d 1093 (8th Cir. 1973), and *United States* v. *Mekjian*, 505 F.2d 1320 (5th Cir. 1975), is misplaced. Reversal was required in *Denmon* because the indictment charging an offense under 18 U.S.C. 641 failed to allege wrongful criminal intent in any fashion. See *Morissette* v. *United States*, 342 U.S. 246 (1952). *Mekjian* involved an assessment of the sufficiency of an indictment under 18 U.S.C. 1001, which—unlike Section 2511(1)(a)—uses both the term "knowingly" and the term "'wilfully". The court concluded that use of the term "knowingly" in the indictment did not obviate the need to include the term "willfully" as well. Moreover, a stricter standard of review was applicable in *Mekjian* because the defendant had attacked his indictment prior to trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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